

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

B 74-1039
-1017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1039

GLEN-ARDEN COMMODITIES, INC., MILBANK TRADING CO., INC.,
ALBERT J. DEEB, JOSEPH LAMONICA, CHARLES LOFFMAN, DAVID
LOSEY, PATRICIA GALIOTO, and DAVID LOEB,

Petitioners,

v.

MARK A. COSTANTINO, United States District Judge
for the Eastern District of New York,

Respondent.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

GLEN-ARDEN COMMODITIES, INC., et al.,

Defendants.

ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITIONERS' REPLY TO THE ANSWER OF
THE SECURITIES AND EXCHANGE COMMISSION

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PRELIMINARY STATEMENT

In substance, the respondent SEC makes two arguments in its answer to the petition for a writ of mandamus herein:

(a) the petition was rendered moot when the district court below (i) filed a memorandum opinion dated January 17, 1974, containing findings of fact and conclusions of law which purport to satisfy the statutory requirements of Rules 65 and 52, F.R.C.P., concededly not met previously by the district court in connection with the prior injunctive orders in effect continuously against the petitioners since November 16, 1973, and (ii) filed a further injunctive order dated January 18, 1974, submitted by the SEC and labeled on its face an "Order of Preliminary Injunction" and

(b) the issue herein of regulatory jurisdiction on the part of the SEC (authority to commence the suit) and judicial or subject matter jurisdiction of the district court (authority of the court to hear the suit) which this court held to exist in a prior and Siamese-twin action involving one of the instant petitioners [S.E.C. v. Brigadoon Scotch Distributing Co., 480 F. 2d 1047, 1052-1053 (2d Cir. 1973)] (i does not exist at all as a "jurisdictional issue" but is merely "perceived" to exist by the petitioners and (ii) if it does exist, is not in "substantial doubt," as petitioners maintain, because the district court (in its opinion dated 1/17/74) and the SEC (in its answer to the instant petition) agree that there is no room for doubt with respect to it.

Petitioners respectfully submit that both arguments are unfounded in the record, incorrect as a matter of law, and entirely misplaced.

Although the SEC argues in its answer that the continuous injunctive relief issued below is divided into two parts by the order of January 18, 1974, (both parts being appealable, the first being concededly questionable or improper, the second having greater claim to validity) the second of which renders the first moot, it also argues, rather inconsistently, that it is "for its part, most desirous that expedited treatment" be afforded by this court to any appeal which petitioners may take (and now have taken by the filing of a second notice of appeal on 1/21/74) from the allegedly bifurcating injunctive order of January 18. Thus it is evident, and the SEC effectively concedes, (a) the unitary character of the injunctive relief below attacked in this mandamus proceeding as "clearly erroneous" and an abuse of the district court's discretion and (b) the fact that petitioners' main argument (that the court's jurisdiction is a debatable issue in this case and that interlocutory injunctive relief granting all that the SEC seeks as final relief cannot, as a matter of law or of the sound exercise of equity jurisdiction, be issued in such a case) applies with equal force to both the orders issued below prior to 1/18/74 and the "order of preliminary injunction" issued on that date. In light of those circumstances, we submit that the SEC's argument of mootness with respect to this petition is specious on its face. Moreover and as the SEC also concedes, petitioners anticipated the possibility of a subsequent order of preliminary injunction being issued (with or without a supporting written opinion) and, for that reason, requested in the petition prospective relief

from this court prohibiting the court below from issuing further interlocutory injunctive relief in the action because of the debatable jurisdictional issue and the need for it to be resolved by this court on appeal and on an appropriate and complete record.

The following pertinent facts and circumstances exist and are amply demonstrated by the record:

(1) the petitioners have been, in fact, continuously enjoined by consecutive orders of the court below from doing business since November 16, 1973, a period of more than nine weeks;

(2) the existence of regulatory authority on the part of the SEC to commence the suit and of judicial (subject matter) jurisdiction of the district court to entertain the suit is a substantial and reasonably debatable issue in this case;

(3) the district court issued, on November 16, 1973, an injunctive order which (a) has been continuously in effect (by virtue of a series of subsequent and identical orders) to date*; (b) was patently unlawful between 11/16/73 and 1/18/74 for a number of reasons, including failure on the part of the district court to comply with the requirements of Rules 65 and 52, F.R.C.P.; and (c) was continued in effect, on 1/18/74, by the "Order of Preliminary Injuntion" herein;

* In its answer this is virtually conceded by the SEC.

(4) the petitioners made and argued on 10/4/73 a motion under Rule 12(b), F.R.C.P., in the district court to dismiss the action for lack of subject matter jurisdiction which, for more than fifteen weeks, the district court refused to decide and, eventually, in its opinion dated 1/17/74, attempted to deal with by "deciding" that it was not a Rule 12 motion to dismiss at all, but would be "deemed" a Rule 56 motion for summary judgment which would be belatedly denied after a mandamus petition had been filed and an appeal taken complaining of the district court's earlier and prolonged refusal to rule;

(5) there is no statutory authority either (a) for the issuance of four successive temporary restraining orders or (b) for the issuance of two consecutive preliminary injunctions in the same action (one supported by an opinion and one not so supported); and

(6) even supported by the district court's opinion dated 1/17/74, issuance and maintenance of the continuous preliminary injunction effective below since 11/16/73 were "clearly erroneous" and an abuse of discretion by the court below because such judicial action (a) was based upon a clear misinterpretation by the district court of clear and controlling principles of law and equity under Rule 65, F.R.C.P., (b) was based upon a clearly

erroneous refusal by the district court to acknowledge the existence of an obvious but difficult question of subject matter jurisdiction, (c) was based upon a clearly erroneous belief on the part of the district court that issuance of the injunctive relief requested by the SEC would "preserve the status quo" that existed before that relief was granted, (d) was based upon a clearly erroneous balancing of the equities and probabilities of irreparable injury involved in the circumstances of the action, and (e) had the clearly erroneous and improper effect of granting the plaintiff Commission through issuance of interlocutory injunctions all of the ultimate relief sought by it in the suit, i.e., putting of the petitioner corporations permanently out of business through injunctions continued in effect for so protracted a period of time that they could almost certainly not survive as viable business entities for so long a time without any receipts.

POINT I

THE INSTANT PETITION FOR MANDAMUS
IS NOT MOOT

Contrary to the contentions of the SEC's answer herein, the instant petition for mandamus is not moot for the following reasons:

(1) The main errors by the court below complained of in the petition have not been corrected. The preliminary injunction below first issued on 11/16/73 is still in effect and has been continuously since that date. The main arguments presented by petitioners in support of their contention that its issuance and maintenance were and are "clearly erroneous" have not been mooted by either the rendering of an opinion below on 1/17/74 or the issuance of an "order of preliminary injunction" on 1/18/74. That injunction has already seriously and irreparably damaged the petitioners by putting them all out of business and depriving the individual petitioners of their incomes and livelihoods for more than nine weeks. It threatens at this point to destroy the petitioner corporations completely and beyond the possibility of revival. For that reason, petitioners desperately need and have requested from this court a prompt hearing and ruling on their arguments that the interlocutory injunctive relief issued by the court below and presently in effect against them is unlawful and so clearly improper in the circumstances that issuance of a writ of mandamus is both appropriate and necessary. Mandamus may be the only procedural device or remedy by which petitioners can get the prompt relief they need from the injunction below:

The SEC's argument of mootness is calculated to frustrate petitioners' efforts to get a prompt adjudication by this court, for acceptance by this court of that argument as presented would further delay petitioners' "day in court": pending processing of a later appeal from the preliminary injunction order below issued on 1/18/74 with the offending injunction in effect during the period of delay. This is an emergency situation in which the petitioners are in financial extremis, and this court should treat it as such.

(2) Mandamus is the appropriate remedy by which to challenge actions taken in excess of statutory authority by the SEC and by the district court below. As this court is well aware, petitioners most vigorously maintain that both the SEC and the district court below have taken action in excess of the statutory authority given them by Congress. Petitioners' arguments from legislative history in that connection have now been presented four times (twice in the Brigadoon case [district court and this court] and twice in this case, and not once in any of its briefs has the SEC made any response at all to those arguments, which a previous panel of this court found to have raised serious jurisdictional issues. Similarly, the court below was also presented with those arguments on 10/4/73, more than fifteen weeks ago, when petitioners made a jurisdictional motion to dismiss. Its reaction was first to hear the motion (on 10/4/73), then to ignore it completely until 1/18/74 (a period of more than 15 weeks) and then to ignore the arguments completely and take the position that no Rule 12(b) motion to dismiss was ever

made in the first place and no jurisdictional issue exists. In so doing the court below ignored completely the holding and advice presented by this court in the Brigadoon case, which was cited and quoted at length to the court below as early as September 17, 1973 -- more than 18 weeks ago.

(3) The errors of law and of judgment made by the court below in the handling of this action thus far are so clear-cut that the test for issuance of mandamus has been manifestly satisfied. Where a clear-cut basis for issuing the writ exists, we submit that this court has a duty to issue it.

(4) Petitioners' argument that an interlocutory injunction cannot properly be issued where jurisdiction is in doubt applies with equal force to the preliminary injunction below both before and after the lower court's opinion and "order of preliminary injunction" were filed on 1/18/74. The same is true of petitioners' argument that it was an abuse of discretion below for the district court (a) to fail and refuse to rule promptly as requested on their jurisdictional motion to dismiss and (b) thereafter to conduct lengthy evidentiary hearings over a protracted period of time involving massive amounts of testimony related almost exclusively to the SEC's allegations of fraud and hardly at all to facts relevant to the jurisdictional issue.

CONCLUSION

For the reasons stated above and in their petition filed on January 10, 1974, petitioners respectfully submit that a writ of mandamus should be issued by this court as requested in the first paragraph of the petition.

Dated: New York, N. Y.
January 22, 1974

Respectfully submitted,

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